85-867

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE J. HODGES,

Petitioner,

– against –

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal employee who was on approved annual leave at the time of a strike may be discharged for strike participation where the leave cancellation notice relied upon by the agency was allegedly placed in a "read and intitial" binder six weeks prior to the employee's scheduled leave, and:

(a) The notice was not introduced at the hearing;

(b) There was no evidence that the employee had read or intialled the notice;

(c) The notice had been continually torn out of the binder;

(d) The agency issued a second notice, just prior to the strike, but after the commencement of the employee's leave;

(e) There was no evidence of actual strike participation by the employee.

2. Whether it was arbitrary and capricious for the Federal Aviation Admini-

stration to discharge petitioner for participating in a strike when other employees on approved annual leave were permitted to return to work.

3. Whether it was arbitrary and capricious for the Merit Systems Protection Board to sustain petitioner's discharge when in four similar cases it reversed the discharges of nine other employees on the ground that the notice was insufficient to cancel approved annual leave.

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SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

WILLIE J. HODGES,

Petitioner,

-against-

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is unreported. It is printed in Appendix A, infra, p.19. The opinion of the Merit Systems Protection Board is unofficially reported in 16 M.S.P.R.[1] 301 (1983) under the title

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1. M.S.P.R. is the Merit Systems Protection Reporter published by West Publishing Co.

Backes et al. v. Department of Transportation[2] and is printed in Appendix B, infra, p.21. The initial decision of the presiding official is unreported and is printed in Appendix C, infra p.25.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on July 24, 1985. The order denying the petition for rehearing was entered on August 21, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend V

No person shall be ... deprived of

2. Petitioner was one of 23 controllers whose cases were consolidated before the presiding official. However, only petitioner and one other controller had been on approved annual leave. All of the controllers in the consolidated case were represented by a colleague who was not an attorney.

life, liberty, or property, without due process of law ...

5 U.S.C. § 7311

An individual may not accept or hold a position in the Government of the United States ... if he-

. . . .

(3) participates in a strike, or asserts the right to strike, against the Government of the Unites States ...

5 U.S.C. § 7703(c)

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the Court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be-

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . . .

(3) unsupported by substantial evidence;

. . . .

STATEMENT OF THE CASE

Petitioner was an air traffic controller employed for 11 years at the Federal Aviation Administration (the "agency") at its New York TRACON[3] facility. A nation-wide strike of all traffic controllers commenced on August 3, 1981 and petitioner was discharged for striking and being absent without leave on August 6, 1981. However, petitioner had been on approved annual leave commencing July 30, 1981 and was not scheduled to return to work until August 13, 1981.

Petitioner was unaware that he was required to report to work during his approved annual leave. Although a mandatory briefing occurred on June 15, 1981,

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3. "TRACON" is an acronym for traffic control.

in which the controllers were advised of the illegality of striking against the United States, the briefing, which was reduced to writing, contained no reference to cancellation of leaves in the event of a strike. Similarly, a telegram which was sent to all controllers warned the employees of the illegality of participating in a strike and that "unauthorized absence when scheduled or directed to report for duty" indicates strike participation. Unlike some controllers on leave who were personally contacted by their supervisors, petitioner received no telephone calls or other notification that his leave was cancelled. Nor was there any evidence that petitioner walked a picket line or engaged in any other strike activity.

To support petitioner's discharge, the agency relied entirely upon a notice that

was allegedly placed in a "read and initial binder" on June 16, 1981, six weeks before his leave commenced. The notice was not introduced at the hearing and there was no evidence that petitioner either saw or initialed it, or how long the notice remained in the binder. The Merit Systems Protection Board ("MSPB") found in several other cases that the notices had been continually torn out of the binder. A second notice was issued on July 31, but the agency did not rely on that notice since petitioner's leave had commenced prior to that date.

At least 20 controllers were not discharged by the agency for striking, because they were on approved annual leave. Of those who were discharged, a significant number were reinstated by presiding officials or the MSPB.

Despite a finding that petitioner was on approved leave, the presiding official

upheld his discharge on the ground that he was "on notice that annual leave would be cancelled in the event of the strike." This finding was based entirely on the facility chief's testimony that he had been "assured by his deputies" that the notices were placed in the binders. The MSPB denied the petition for review.

Jurisdiction of the Court of Appeals for the Federal Circuit was invoked pursuant to 28 U.S.C. § 1295(a)(9). The court affirmed the decision of the MSPB that petitioner "was not on annual leave on the basis of the opinion of the presiding official of the Board."

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the Federal Circuit is in conflict with this Court's decisions in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and Greene v. Lindsey,

456 U.S. 444 (1982). It is also in conflict with the decision of the United States District Court for the District of Columbia in United Federation of Postal Clerks v. Blount 325 F. Supp. 879 (D.D.C. 1971), aff'd. 404 U.S. 802 (1972) and the Federal Circuit's own decision in Schapansky v. Department of Transportation 735 F.2d 477 (Fed. Cir. 1984), cert. denied 105 S.Ct. 432 (1984).

(a) In Mullane v. Central Hanover Bank & Trust Company, supra this Court stated that "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action ..." 339 U.S. at 314. Citing Mullane frequently, this Court in Greene v. Lindsey, supra, held that notices posted on the doors of tenants' apartments which were

"not infrequently" removed by others, did not "satisfy minimum standards of due process." 456 U.S. at 453. Therefore, this Court concluded, the failure to afford the tenants adequate notice of proceedings before issuing a final order of eviction was a deprivation of property with due process of law.

The MSPB found, in other decisions involving controllers who were discharged from the New York TRACON facility, that the notices of leave cancellation placed in the read and initial binder six weeks before the strike were insufficient, absent other evidence, to support a prima facie case of strike participation for employees who were on approved annual leave. Carpenter v. Department of Transportation, Docket No. NY075281F1432, 17 M.S.P.R. 84 (MSPB 1983); Coleman v. Department of Transportation, Docket No. NY075281F0482ADD, 21 M.S.P.R. 596 (MSPB

1984); Ailes v. Department of Transportation, Docket No. NY075281F0842, 17 M.S.P.R. 114 (MSPB 1983). In the New York cases, as well as Benson v. Department of Transportation, Docket No. PH075281F1021, 19 M.S.P.R. 596 (MSPB 1984), which arose out of the Pittsburgh TRACON, the MSPB noted that the notices were constantly torn out of the read and initial binders. But even where two controllers had actually read and initialled the notice, the MSPB found that "the agency's attempt to cancel the leave of appellants ... solely by means of the June ... memorandum constitutes an insufficient communication of the cancellation and was therefore ineffective." Benson, supra, at p.3.

The MSPB reasoned that the June 16 notice was too remote from the actual event of the strike to constitute adequate notice of cancellation of approved annual leave, particularly in view of the fact

that the agency issued a second notice, three days before the strike, but after the controllers had left on their vacations. As noted in Ailes, supra, at p.3, fn. 4 of the decision, "the fact that the agency issued the order of July 31 tends to weaken its argument that it depended on the June 16 order to establish cancellation of annual leave at the time of the strike in August."

Since there was no evidence that petitioner had seen or initialled the first notice, and since he was already on leave when the second notice was issued, the notice of leave cancellation which was relied upon by the agency to cancel petitioner's leave and is the sole basis for the conclusion that he participated in the strike, did not satisfy the minimum standards of due process required by the Constitution and Mullane and Greene cases, supra, because it failed to afford

petitioner adequate notice that his leave was cancelled. Petitioner's discharge, based entirely upon the notice, was thus a deprivation of property without due process of law.

(b) In United Federation of Postal Clerks v. Blount, supra, the district court, in a decision affirmed by this Court, held that "only an actual refusal in concert with others to provide services" is forbidden by 5 U.S.C. § 7311(3). 325 F.Supp at 884. In Schapansky v. Department of Transportation, supra the Federal Circuit Court upheld the MSPB's view that such an actual refusal to provide services may be shown by an employee's unauthorized absence during a widespread strike of general knowledge, even if there is no evidence of the employee's actual participation in the strike.

Since the petitioner was on authorized, approved annual leave during the

strike, and such leave was not effectively cancelled by the agency, the decision below conflicts with the Court's own decision in Schapansky which requires that in order to find strike participation based on absence alone, an employee's absence must be unauthorized.

2. Another important question of law raised in this case is whether a federal agency, acting in a quasi-judicial capacity, may make inconsistent decisions involving persons similarly situated or whether such an agency is required to apply the same standard of conduct to all persons involved in a given set of circumstances.

(a) The Federal Aviation Administration was inconsistent in its treatment of petitioner. The record shows that at least 20 employees were not discharged by the agency because those employees were on approved annual leave at the time of

the strike. This is so even though it was agency-wide policy to place a notice in the "read and initial binder" cancelling annual leave in the event of a strike. The agency thus implicitly recognized that such notice was insufficient to form a basis for finding strike participation without evidence of personal notice or actual participation.

(b) The MSPB acted arbitrarily and capriciously, made a decision unsupported by substantial evidence and abused its discretion when it declined to review that part of the initial decision relating to petitioner and sustained petitioner's removal by the agency. In at least four other decisions, three of which arose out of the same TRACON facility as petitioner's, the MSPB made the opposite decision on precisely the same facts as were present in petitioner's case. Carpenter, Benson, Coleman and Ailes, supra. In

Carpenter the MSPB stated, at pp. 3-5:

> ...[T]he agency was unable to present any evidence that appellant had actually read the memorandum...[W]e find that, because the memorandum was issued more than a month before the commencement of appellant's scheduled vacation, it would not, absent other evidence, be sufficient to cancel appellant's previously approved annual leave.
>
> . . . .
>
> Thus, we find that there was no evidence of unauthorized absence by appellant during the strike period and that the presiding official erred in finding that the agency had established a prima facie case of appellant's strike participation under Schapansky ... Cf. McPartland v. Department of Transportation ... [13 MSPB 155, 156 1983] (wherein the agency presented documentary and testimonial evidence that the appellant had been notified, both in writing and in person, that his annual leave had been cancelled).

Similarly, in Coleman the Board stated, at 12,:

> [T]he agency completely failed to meet its burden to show that notice of the cancellation of that leave had been effectively communicated to them. The [second] leave cancellation notice was not published until after the appellants had begun

> their previously approved annual leave ... and the agency made nc showing of subsequent communication of leave cancellation to the appellants ... While we do not ascribe bad faith or ill will to the agency, and have previously noted the extreme conditions under which the adverse actions were processed, we conclude that the agency should have realized that it had insufficient evidence to sustain its charges in this case, and should have decided against removal.[4]

In Benson, supra, the MSPB concluded that the agency had "failed to show that appellants ... previously authorized annual leave was properly cancelled ... and has therefore failed to establish a prima facie case of strike participation" under Schapansky. Benson, supra at 3.

"Elemental tenets of administrative law" require that "agencies apply the

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4. Coleman was a consolidated appeal involving only the issue of attorney fees. The regional office had sustained the appeals of two controllers from New York TRACON on the ground of insufficient communication of leave cancellation. Two weeks later, petitioner's appeal was denied by the same regional office on the ground that the same notice was sufficient.

the same basic standard of conduct to all parties appearing before them". Miner v. Federal Communications Commission, 663 F. 2d 152, 157 (D.C. Cir. 1980). Teamsters Local Union 769 v. NLRB, 532 F.2d 1385, 1392 D.C. Cir. (1976). When an administrative agency acts as a quasi-judicial body it is subject to the requirement that it not act arbitrarily or capriciously and has an obligation to render consistent opinions. Chisolm v. Defense Logistics Agency 656 F.2d 42,47 (3rd Cir. 1981).

It was arbitrary and capricious and violative of basic principles of administrative law for the MSPB to find that petitioner's leave was cancelled by the same notice which it found insufficient to cancel the leaves of other controllers.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: New York, New York
November, 1985

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WILLIAM J. HODGES,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-1005A
MSPB No. NY075281F0895

DECIDED: July 24, 1985

Before FRIEDMAN, Circuit Judge, MILLER, Senior Circuit Judge, and NIES, Circuit Judge.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board (Board) affirming the removal of the petitioner from his position as an air traffic controller for participating in the 1981 illegal air traffic controllers' strike is affirmed.

Appendix A

OPINION

The sole question is whether the petitioner had been on annual leave on the day on which he was found to have participated in the strike. We affirm the decision of the Board that he was not on annual leave on the basis of the opinion of the presiding official of the Board.

Appendix B

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WILLIAM E. BACKES, ET AL.	)
v.	)
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION OF ADMINISTRATION	)

DOCKET NUMBER
NY075281F0846

OPINION AND ORDER

The agency removed the appellants from their positions of Air Traffic Control Specialists at its air traffic control facility in Westbury, New York. The agency based the removal actions on charges of (1) participating in a strike against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918, and (2) unauthorized absence (AWOL).

The appellants have now petitioned the Board for review of the presiding

official's initial decision. Upon consideration of the appellant's petition, we find that the legal issues raised have been raised for the first time in the petition for review, addressed by the presiding official, or resolved by the Board in other related cases. The presiding official's findings as to those legal issues are essentially consistent with ours, and any inconsistency in the presiding official's determination on those issues would not affect the outcome of this appeal.[2] In addition, to the extent that the arguments made in the appellants' petition relate to the presiding official's factual determinations, we find that the appellants have

2. The Board has resolved the issues raised in the petition for review by the appellants in the following cases: Ketchem v. Department of Transportation, MSPB Docket Number DA075281F0713 at 4-19 (May 28, 1982) (official notice of the existence of an unlawful strike) motion for clarification denied (November 23, 1982);

not demonstrated any such factual error by the presiding official, based on specific references to the record, sufficient to warrant the Board's full review of the record. See Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980).

(fn. cont.) Campbell v. Department of Transportation, MSPB Docket Number DE075281F0674 at 7-8 (April 25, 1983) (period of participation in the strike sufficient to support the charges); Schapansky v. Department of Transportation, MSPB Docket Number DA075281F1130 at 6 n.2 and 10-11 (October 28, 1982) (prima facie case of strike participation and reasonableness of the removal penalty); Desiderio v. Department of the Navy 4 MSPB 171 (1980) (AWOL alone as cause for removal); Schapansky, supra, at 7-8 (invocation of 5 U.S.C. Section 7513(b)(1) to shorten the notice period); Karapinka v. Department of Energy, 6 MSPB 114, 115-16 (1981) (reversible procedural error by a presiding official); Anderson v. Department of Transportation, MSPB Docket Number SL075281F0347 at 8-13 (April 25, 1983) ("command influence"); Baracco v. Department of Transportation, MSPB Docket Number DC075281F0895 at 17 (April 25, 1983) (agency's failure to afford employee not less than 7 days to respond to written notice of removal does not, of itself, warrant reversal); Douglas v. Veterans Administration, 5 MSPB 313, 331-33 (1981) (agency's imposition of a removal penalty on an air traffic controller cannot be deemed clearly excessive or disproportionate to a sustained charge of striking against the Federal Government despite the many years of government service and flawless employment record);

Appendix B

. . . .

August 19, 1983 s/
Robert E. Taylor
Secretary

Washington, D.C.

(fn. cont.) Book v. U.S. Postal Service, 6 MSPB 322 (1981), (adverse inference may be drawn from refusal to testify), aff'd 675 F.2d 158 (8th Cir. 1982); Baracco, supra, (appellant bears the burden of proving harm as to all alleged procedural errors).

Appendix C
UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK REGIONAL OFFICE

William E. Backes et al. 1/)
)
v.)
)
Federal Aviation Administration)

CASE NO.
NY075281F0846

INITIAL DECISION

By timely petitions, the appellants whose names are listed in the appendix to this decision appealed their removals from the Federal Aviation Administration (agency).

When removed, the appellants were in the competitive service and were not ser-

1/ This decision concerns the appeals of 23 former air traffic controllers represented by Donald Bodine. These cases have been consolidated by the presiding official on her own motion because each appellant designated the same representative; the agency designated one representative to argue all of the cases; the only witness called upon to testify gave testimony applicable to each of the appellants, and; the issues are all similar if not identical. Moreover consolidation of the cases was not shown to adversely affect the interests of any of the parties, and it allowed for expeditious processing of the cases. 5 C.F.R. 1201.36 (1982).

ving trial or probationary periods. They were therefore entitled to appeal their removals to the Board. 5 U.S.C. 7511(a)(1); 7512(1); 7701 (1978).

Each of the appellants was an Air Traffic Controller who was charged by the agency with participating in a strike called by the Professional Air Traffic Controllers' Organization (PATCO) and for being Absent Without Official Leave (AWOL). The dates for which they were all charged fall within the dates of August 5, 1981 beginning at 3:00 p.m., and August 8, 1981. After affording each appellant a period of seven days in which to respond to the proposal, each of the appellants was removed.

The burden of proof falls upon the agency. It must prove each element of its case by preponderant evidence. 5 U.S.C. 7701 (1978); 5 C.F.R. 1201.56 (1982); In re Van Sciver, 1 MSPB 94 (1980). In pro-

ving its case, the agency may rely on facts officially noticed. 5 C.F.R. 1201.66 (1982). Official notice is taken of the facts that "...an unlawful strike of air traffic controllers commenced on August 3, 1981, and was still in progress on August 6, 1981." Ketchem v. Department of Transporation, MSPB Docket No. DA07528 1F013 (1982).

Mr. Charles E. Stafford, Chief of New York TRACON, testified on behalf of the agency. He was the Facility Chief over each of the appellants. Chief Stafford testified that the agency's mission is to provide air traffic services to 30 airports in the New York Metropolitan area. (Tr. 7). 2/ The controllers separated the arrivals and departures of aircraft using the 30 airports. (TR. 13-14). Prior to the commencement of the strike the facility operated in three shifts.

2/ "Tr __" refers to pages of the Hearing Transcript.

Appendix C

There was a day shift from 7:00 a.m. through 3:00 p.m., a swing shift from 3:00 p.m. through 11:00 p.m., and a midnight shift from 11:00 p.m. through 7:00 a.m. The controllers were aware of their individual schedules from a posting of their shifts which was put up 21 days in advance of their shifts. The schedule was then made available in each of the three sectors of the facility. (Tr. 8).

Chief Stafford testified that there were rumors of a strike in June of 1981. When June passed, a new rumor circulated that the strike would take place in August. Between June 3, and June 15, 1981, an Assistant Chief gathered the appellants in a conference room and read to them the contents of 18 U.S.C. 1918. Each was given a copy of the provision as well. In essence, this provision states that anyone who participates in a strike against the government may not accept or

hold a position in the government, and shall be fined not more than $1,000 or imprisoned not more than one year and a day or both. (Tr. 19-22). As further preventive actions. Chief Stafford testified that on June 16 and again on July 31, 1981 notices were posted which cancelled annual leave in the event of a strike. These notices indicated that the cancellation of leave would be activated on the commencement of a strike, and that the notices were effective until further notice. The notices were put in a read and initial binder for each of the three sectors. Chief Stafford explained that each air traffic controller was required to read the binder prior to assuming an operational position; notices stay in the binders for a couple of months. (Tr. 29-30). On cross-examination Chief Stafford testified that he did not know specifically who posted the notices, but he was

assured by his Deputy Chief that posting had been accomplished. (Tr. 51).

On August 3, Chief Stafford testified, for the day shift only 2 of the expected 44 controllers reported for work. On the following shift 1 or 2 out of the same expected number reported; no one showed up for the midnight shift. Moreover, picketers appeared outside of the main gate of the facility. They varied in number from 4 to 20 persons who walked back and forth in front of the main gate. They did move out of the way to allow people to enter or leave the facility. Some of the picketers carried signs which read "PATCO LOCAL 160 ON STRIKE". According to Chief Stafford, that was the PATCO organizational unit at the TRACON facility. Through contact with the other facilities in the region and with other regions, Chief Stafford learned that a nationwide strike was in effect. Picke-

ting, at least in the Eastern Region, continued to late September and possibly into early October 1981. (Tr. 11-12).

As a result of the strike, stated Chief Stafford, the facility could not provide the service that they were uniquely able to provide to their users. This inability caused great inconvenience to the public. The impact of the strike, which Chief Stafford characterized as substantial, is still being felt at the facility. (Tr. 13).

According to Chief Stafford, each of the appellants failed to report for his/her regularly scheduled shift after 11:30 a.m. on August 5, 1981. For this reason, he proposed their removals. The proposal letter in each case was sent by regular and by certified mail. These letters stated that the appellants had an opportunity to reply to the notice and could do so orally, in writing, or both orally

and in writing. According to Chief Stafford, none of the appellants made an oral reply, and none called to explain his absence. (Tr. 23, 37). All of the appellants made a written response. With the exception of one, they were what Chief Stafford called the "standard PATCO response". He characterized the response in this manner, because he had received approximately 170 responses which were identical. Two of the responses were received after the seven days in which to respond had expired. Chief Stafford testified that all of the responses, including those received late, were read and considered, and each failed to provide a basis for excusing the appellant's absence. He therefore decided to sustain the proposed removal and notified each appellant of his termination by certified and regular mail. (Tr. 19-22).

Prior to resting its case, the agency

provided Mr. Stafford with the agency file for each of the 23 appellants. Mr. Stafford reviewed each file, and testified concerning each individual appellant's work schedule for the week of August 3, the type of written response submitted in reply to the proposal letter, whether or not the appellant reported for work on his given schedule, and why the individual appellant was removed. In each instance, Mr. Stafford testified that the appellant was removed for participating in an illegal strike against the government and for being AWOL during the midst of an illegal strike.

Chief Stafford was extensively questioned under cross-examination. He was shown a copy of the agency's handbook and the provision concerning the delegation of authority to decide disciplinary actions. Although the handbook does not list facility chiefs among those persons

so authorized, Chief Stafford testified that the authority was redelegated to him by the Regional Director who is vested with that authority. This redelegation preceded the strike. (Tr. 44-45). When asked whether or not President Reagan decided to remove the appellants prior to the letters of proposed removal being sent, Chief Stafford testified that he, himself, made the decision to remove the appellants, and his decision was not made prior to his sending the proposed removal letters to the appellants. (Tr. 47). Chief Stafford conceded that the normal period in which to reply to a proposal of disciplinary action is 30 days. However, he justified his use of seven days in which to respond on the provision in the law that states that a shortened notice period is appropriate when the agency official has reason to believe that a crime has been committed. He thus felt

justified in shortening the notice period even though he was unaware and is currently unaware of any pending criminal actions against any of the appellants. (Tr. 48). Moreover Chief Stafford conceded that the "standard PATCO response" also included a request for an extension of time in which to reply and a request made under the Freedom of Information Act for greater information. Chief Stafford testified that he did not feel obligated to respond to the request, because all of the information that he relied upon was made available to the appellant in the agency file, and none of the information requested under the Freedom of Information Act had been relied upon by him in making his decision. (Tr. 53).

None of the appellants took the stand. However, their representative raised defenses on their behalf. In the case of Mr. Charles Henderson, it is al-

leged that he was entitled to sick leave. The appellants representative submitted medical documentation purporting to show that the appellant was incapacitated for duty. The medical documentation submitted is on the stationery of Robert B. Bass, Jr., and is dated August 28, 1982. This document states that "As a result of roller skating fall July 29, 1981 the above was incapacitated for employment from July 30, 1981 for treatment ..... sprain right ankle. Treatment consisted of soaks, ankle support, reduced weight hearing-pain medication." The appellant's name appears on the top of the form and it is signed by R. Bass Jr., D.O. (Appellant Exhibit 2). Other than pointing out the fact that Messrs. Pratte and Hodges were scheduled for annual leave, nothing more specific was said about their cases.

In general and on behalf of each of

the appellants, several legal arguments were raised. These defenses are affirmative defenses which will be considered separately after a determination has been made on whether the agency has met its prima facie case.

The Board in the case of Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 (1982), held that the agency must prove that the strike was a matter of general knowledge, and that an employee was AWOL, in order to make out a prima facie case. 3/ Part of the agency's burden in meeting this test has already been proven by virtue of the fact that official notice has been taken that a strike occurred at least through August 6, 1981. On the dates officially noted as well as for subsequent dates through

3/ Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 (1982), page 6 footnote 2.

Appendix C

August 8, Mr. Stafford testified, without contradiction, that the strike continued. His testimony was that picketers continued to be present August 7 or 8, and that the level of absenteeism was similar. Moreover he testified that those manifestations of a strike were noted not only at his facility, but were noted regionwide. Because he testified that the impact of the strike continues to date, it must be found that there was an impact caused by the absenteeism at least on August 7 and August 8. Based on Mr. Stafford's unrefuted testimony, and the official notice taken, I find that the agency has proven this aspect of its prima facie case.

Mr. Stafford also provided credible testimony as to each of the appellants' scheduling during the week of August 3, 1981, and the fact that all annual leave was cancelled during that period. Al-

though Chief Stafford did not personally place the notices cancelling leave in the read and initial binder, he stated that he had been assured by his deputies that they were so placed. He further testified that it was the responsibility and habit of each air traffic controller to read the binder prior to commencing operations. Under the circumstances, and in the absence of contradictory evidence, I have no reason to doubt the Chief's testimony in this regard. Accordingly, I find that the agency has shown that the appellants were AWOL, and that annual leave was cancelled, as averred by the agency.

Under Schapansky, supra, in order to refute the agency's prima facie case, the appellants would have to demonstrate ignorance of the strike and/or the fact that their absence was due to some factor other than intentional participation in the

strike. As stated none of the appellants took the stand. In view of the notoriety attending the strike, the extensive media coverage of the strike, and the fact that it struck the very livelihood of each of the appellants charged, I find it unlikely if not improbable that any was unaware that a strike was in progress. While two of the appellants, Pratte and Hodges, were initially granted approved leave, the only evidence before me indicates that the appellants were on notice that annual leave would be cancelled in the event of a strike. Similarly there is no evidence before me that Mr. Henderson was granted approved sick leave or entitled to sick leave on the dates that he was charged with being AWOL and participating in a strike. While the Board may examine medical evidence submitted for the first time at hearing 4/, the medical certification submitted at

hearing, is insufficient to establish that the appellant was incapacitated for duty since the note does not indicate that the appellant was unable to work after July 30, 1981.

Because the agency met its initial burden in establishing a prima facie case, and the credible evidence that was presented has not been refuted, I find that the agency has established by preponderant evidence that the appellants were striking and AWOL on the dates charged.

In addition to proving that the appellants committed the acts as charged, the agency must also show that there is a connection between their conduct and the agency's ability to carry out its mission. Young v. Hampton, 568 F.2d 1253, 1258 (7th Cir. 1978). Mr. Staf-

4/ Zeiss v. Veterans Administration, MSPB Docket No. NY075209017 (1981), at page 3.

ford, the Facility Chief testified that the strike had a severe impact on the overall air traffic system due to New York's importance in managing air traffic for 30 metropolitan airports. During the strike, testified Mr. Stafford, the facility's efficiency was substantially reduced. I find that Mr. Stafford's unrebutted testimony establishes by a preponderance of the evidence that the appellant's conduct had a detrimental effect on the agency and its ability to perform its assigned mission. I can think of nothing more crucial to an agency's mission than having a dependable workforce with which to perform its services.

Notwithstanding the finding that the agency has proven its case by a preponderance of the evidence, an agency action may not be sustained if the appellant:

(A) shows harmful error in the application of the agency's procedures in

arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with the law. 5 U.S.C. 7701 (c)(2) (1978). These defenses are defenses upon which the appellants bear the burden of proof. 5 C.F.R. 1201.56(2)(b) (1982). As affirmative defenses the appellants made arguments centering upon the following concepts, double deopardy (Tr. 48), rights to a speedy trial (Tr. 56), constructive discharge (Tr. 82) and, that 5 U.S.C. 7311 is a national security statute 5/ (Tr. 59). Two other arguments

5/ The appellants argue that the agency's handbook on adverse actions excludes matters taken for national security reasons from being appealable to the Board. The section specifically states, at page 3, that matters excluded from coverage of the order are "actions taken for security reasons under 5 U.S.C. 7532, or any other similar statute." (Appellant Exhibit 1.)

made are that the removal of the appellants is outside of the agency's guidelines on penalties for specific offenses, and that in actuality it was President Reagan who fired the air traffic controllers.

The first group of defenses, while asserted, were not supported by any evidence. Moreover double jeopardy, and the right to a speedy trial, are criminal law concepts with no applicability to administrative proceedings. De Joy v. Health and Human Services, 4 MSPB 96, 97 (1980). While the appellant asserts that 7533 is a national security statute, there is no evidence to warrant that conclusion or to show that it is similar to 5 U.S.C. 7532, which is a national security statute. Moreover, assuming that 5 U.S.C. 7311 was a national security statute, the agency, any agency could not by its own order divest the Board from its jurisdic-

tion. 5 U.S.C. 7511 provides for the Board its definition of employee. 5 U.S. C. 7512 states that an employee may appeal a removal to the Board. The only exception to this would be a removal under section 7532, which is consistent with the agency's order. Therefore I find the appellants' argument that this action is not appealable to the Board to be unpersuasive.

It is argued that striking is an unfair labor practice under the Civil Service Reform Act of 1978; for striking, PATCO was decertified and that is the only remedy allowed for striking. The appellants also claim that because the organization and its members are synonymous, removal of the appellants is inappropriate. This is again the double jeopardy argument that was previously made and disposed of in part. While striking is an unfair labor practice,

Appendix C

unfair labor practices are not chargeable against employees. 5 U.S.C. 7116 (1978). The Civil Service Reform Act defines a person to be either an individual or a labor organization (5 U.S.C. 7103 (a)(1) (1978), however, it also gives separate definitions to employees and labor organizations. They are not synonymous. These appellants were charged with and removed for striking in their capacities as employees and not based upon their capacities of individuals who comprise a labor organization.

The contention that the penalty imposed by the agency falls outside the range of appropriate penalties is likewise unpersuasive. That portion of the chart relied upon the appellant does not show a suggested penalty for AWOL when that AWOL is coupled with participation in a strike or occurs during a strike. Therefore I am unable to conclude the evidence before

me that the agency acted inappropriately by removing the appellants.

As to the last two contentions, they also have not been proven. Mr. Stafford credibly testified that he in fact made the decision to remove the appellants. While it could be found that President Reagan established policy that air traffic controllers would be removed for striking, there is no evidence he participated in the decision-making to remove any individual air traffic controller. Finally, I find that the appellants were not constructively discharged; they were actually discharged. A constructive discharge would occur where employees are not allowed to return to work by their employer, and that is the cause of their not working. In this case the appellants voluntarily absented themselves from work. That absence during the strike is the cause of their discharge. In view of the

evidence before me I am unable to conclude that the appellants have established a prima facie case on any of the affirmative defenses raised.

The last issue to be resolved is whether or not the agency's choice of penalty, i.e., its removal of the appellants is clearly excessive or disproportionate to the charges of being AWOL and striking against the agency. Douglas v. Veterans Administration, MSPB Docket No. AT075299006 (1981). In removing the appellants the agency relied upon 5 U.S.C. 7311 which can be read to require the removal of anyone who strikes against the government. Due to the gravity of the offenses committed by these appellants and in view of a statute that clearly sanctions removal in such a situation the agency's action in removing the appellants cannot be said to be unreasonable. Schapansky, supra, at page 10. The ap-

pellants have failed to demonstrate or even allege any factors that would warrant mitigation of their removals. Therefore I find that the agency, by removing each of the 23 appellants listed in the appendix, selected a penalty that was not excessive, disproportionate to the sustained charges, arbitrary, capricious, unreasonable or an abuse of discretion. Therefore the agency's action in removing each of the appellants is sustained.

. . . .

For the Board:

Dated: November 15, 1982

/s/
Bonita Kirkland
Presiding Official

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 85-1005A

WILLIAM J. HODGES, NY075281FO895,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED.

DATED July 24, 1985

ENTERED BY ORDER OF THE COURT
George E. Hutchinson,
Clerk

Petition for Rehearing, Denied, August 21, 1985.

s/
Clerk

Appendix E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 85-1005A

WILLIAM J. HODGES, Petitioner)
)
v.)
)
DEPARTMENT OF TRANSPORTATION,)
FEDERAL AVIATION ADMINISTRATION,)
Respondent.)

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

FOR THE COURT:

/s/
George E. Hutchinson,
Clerk

August 21, 1985
Date

Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-867 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE J. HODGES, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that substantial evidence supports the decision of the Merit Systems Protection Board sustaining the agency's removal of petitioner for participating in a strike against the United States and for being absent without leave.

2. Whether the court of appeals correctly determined that petitioner's removal was neither arbitrary nor capricious.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-867

WILLIE J. HODGES, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-20) is unreported. The opinions of the Merit Systems Protection Board (Pet. App. 21-49) are also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 50) was entered on July 24, 1985. Petitioner's petition for rehearing was denied on August 21, 1985 (Pet. App. 51). The petition for a writ of certiorari was filed on November 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges his removal from federal employment following the air traffic controllers' strike in 1981. The background of the strike and the subsequent litigation are

set forth in our Brief in Opposition in *Campbell* v. *Department of Transportation, FAA*, No. 84-78, in response to one of a number of other petitions arising out of the strike.[1]

1. Petitioner was removed from his position as an air traffic controller on the grounds that he participated in a strike against the United States and was absent without leave during the strike. He appealed to the Merit Systems Protection Board (MSPB or Board), where he was afforded a hearing (consolidated with a number of other cases). The agency established a prima facie case by demonstrating that petitioner was absent without leave during a strike of general knowledge.[2]

Petitioner contended that he was on annual leave at the time the agency concluded he was striking. The presiding official found, however, that petitioner's annual leave had been cancelled (Pet. App. 38-39). This finding was based upon testimony of the chief of the facility at which petitioner worked that a memorandum cancelling all leave in the event of a strike was placed in a mandatory "read and initial" binder for each sector (*id.* at 29). This memorandum, dated June 16, 1981, provided that it was effective until further notice (*ibid.*). The presiding official also

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[1]A copy of our response in *Campbell* has been sent to counsel for petitioner.

[2]The standard applied requires that the agency at all times bear the burden of persuasion with respect to strike participation; the agency must show by a preponderance of the evidence that the employee withheld his services in concert with others. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482-483 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984). Once the agency has made a prima facie showing by evidence of the employee's unauthorized and unexplained absence during a strike of general knowledge, "the burden of going forward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing." 735 F.2d *id.* at 482. See Pet. App. 26, 37-41.

concluded that petitioner had notice of the cancellation of his leave (*id.* at 39-40). "While [petitioner was] initially granted approved leave, the only evidence before me indicates that [he was] on notice that annual leave would be cancelled in the event of a strike" (*id.* at 40). In this regard, petitioner's facility chief testified that each controller was required each day to read the memoranda in the binder before he began controlling traffic (*id.* at 29). Moreover, while the agency did not present evidence that petitioner had actually initialed the memorandum, the facility chief testified that he had instructed that the memoranda be distributed and that he had confirmed through conversations with his deputy that the distribution had been accomplished (*id.* at 29-30, 39).

Notwithstanding this evidence, petitioner elected not to testify and never denied having had notice of the leave cancellation (Pet. App. 35). Indeed, the only response petitioner made to his proposed removal was "the standard PATCO [written] response" (*id.* at 32). Accordingly, the presiding official concluded that "the agency has established by preponderant evidence that [petitioner was] striking and AWOL" (*id.* at 41).

The full Board denied petitioner's petition for review (Pet. App. 21-24). The Board found that it had already resolved many of the issues presented, and that "[t]he presiding official's findings as to those legal issues [presented to her] are essentially consistent with ours, and any inconsistency in the presiding official's determination on those issues would not affect the outcome of this appeal" (*id.* at 22; footnote omitted). The Board also found that, "to the extent that the arguments made in the * * * petition relate to the presiding official's factual determinations, we find that [petitioner has] not demonstrated any such factual error by the presiding official, based on specific references to the record, sufficient to warrant the Board's full review of the record" (*id.* at 22-23; citation omitted).

2. Petitioner then sought review in the United States Court of Appeals for the Federal Circuit His was one of approximately 3,500 similar petitions filed in the court of appeals by discharged air traffic controllers. All but nine cases were stayed pending the court's decisions in those "lead cases." On May 18, 1984, a five-judge panel of the court of appeals issued 11 decisions sustaining the removals of all but one of the petitioners in the lead cases.

A number of the unsuccessful petitioners filed petitions for writs of certiorari; all were denied. See, *e.g.*, *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984); *Anders* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), cert. denied, No. 84-259 (Nov. 13, 1984); *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir.), cert. denied, No. 84-78 (Oct. 9, 1984). After this Court denied the petitions in the lead cases, the court of appeals lifted the stay of the other pending appeals.

In one of the first decisions issued by the court of appeals after the stay was lifted, the court affirmed the decision of the Board in petitioner's case (Pet. App. 19-20). The court noted that the "sole question" on appeal was whether petitioner had been on annual leave on the day on which he was found to have participated in the strike, and affirmed the decision of the Board that he was not (*id.* at 20).

ARGUMENT

The unpublished and summary decision of the Federal Circuit in this factbound dispute is correct, does not conflict with the decisions of this Court or any other court of appeals, and does not merit further review.

1. The court of appeals correctly found that substantial evidence supports the decision of the Board that petitioner had notice of the cancellation of his leave. The agency presented competent evidence that a notice dated June 16, 1981, was placed in the read and initial binders and that it

cancelled petitioner's leave in the event of a strike. Competent evidence further established that the cancellation was, by its terms, effective until further notice and that petitioner was required to read the notice prior to assuming his duties controlling aircraft. There is no evidence in the record that the notice was ever removed from the binder or that petitioner was unaware of it.[3] Indeed, petitioner did not take the stand to deny that he had notice of the cancellation of his leave. It is entirely proper to infer that truthful testimony would not have served his interests, and therefore to draw an adverse inference from his failure to testify. *Adams* v. *Department of Transportation, FAA*, 735 F.2d 488, 492 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984). In any event, because the *only* evidence before the Board established that petitioner was notified of the cancellation of his leave, the court below was clearly correct in finding that the Board's decision was supported by substantial evidence.[4]

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[3]Accordingly, there is no conflict between the decision of the court of appeals and this Court's decisions in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), or *Greene* v. *Lindsey*, 456 U.S. 444 (1982). There are no facts in this case upon which one could conclude that the leave cancellation notice was removed (frequently or otherwise) from the binders or that the notice was not reasonably calculated to apprise petitioner of the cancellation of his leave.

In his petition (at 7-13) and before the court of appeals, petitioner argued that the leave cancellation notice was torn out of the binder and attempted to rely upon evidence contained in the records of other appeals to the Board by other air traffic controllers in other cases. But the Board and the court of appeals were required to render their decisions based upon the record before them. One side cannot rely on non-record evidence when the other side is held to the record. It is simply untenable to contend, as petitioner does, that the court of appeals should have reversed the decision of the Board based upon evidence that was not in the record before the Board or the court.

[4]Because petitioner's leave had been effectively cancelled, his absence *was* unauthorized and he is incorrect in suggesting (Pet. 12-13) that the court of appeals' decision in his case conflicts with its decision in *Schapansky*. Moreover, our discussion above (page 2 note 2) demonstrates that the definition of strike applied in this case is, contrary to

A writ of certiorari is inappropriate where petitioner merely challenges the court of appeals' conclusion regarding the evidentiary support for the decision below. This Court has recognized that the courts of appeals have the principal responsibility for determining substantial evidence questions. *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 309-310 (1974); see 5 U.S.C. 7703(c). There is no indication in the present case that the court of appeals " 'misapprehended or grossly misapplied' " the substantial evidence test. 417 U.S. at 310 (quoting *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951)).

2. Petitioner is also incorrect in contending (Pet. 13-17) that the decision of the Board was arbitrary and capricious because he was treated differently from others who presented "precisely the same facts." The decisions of the Board petitioner cites are readily distinguishable.

In *Carpenter* v. *Department of Transportation*, 17 M.S.P.R. 84 (1983), the Board found that the June 16 notice cancelling annual leave was not sufficient to support the controller's removal. The evidence before the Board was critically different, however, since the controller testified that he was unaware of the June 16 notice and presented evidence that he had been incommunicado on a canoeing and fishing expedition in the Canadian wilderness. No such evidence was presented here.

Benson v. *Department of Transportation, FAA*, 19 M.S.P.R. 596 (1984), is distinguishable since the record there contained evidence that the notice had been removed from the mandatory reading binder. In addition, while petitioner correctly notes (Pet. 10) that the Board in *Benson*

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petitioner's contention (Pet. 12), entirely consistent with *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879 (D.D.C.), aff'd, 404 U.S. 802 (1971).

found the notice ineffective to cancel the leave of two controllers who had actually initialed the notice, he fails to point out that this was because one controller was out of town and unaware of the existence of the strike and the other was misled by a telegram notifying him only to report for his next assigned shift. Petitioner in this case never alleged facts similar to those in *Benson*.

The remaining two cases cited by petitioner — *Coleman* v. *Department of Transportation, FAA*, 21 M.S.P.R. 596 (1984), and *Ailes* v. *Department of Transportation, FAA*, 17 M.S.P.R. 114 (1983) — are, like *Carpenter*, cases in which the controllers denied under oath having ever seen the notices cancelling leave. In view of this important difference in the evidence before the Board, it was not arbitrary for it to decide those cases differently from the present one.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
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SANDRA P. SPOONER
Attorneys

JANUARY 1986

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[5]Petitioner also contends (Pet. 13-14) that the FAA, as well as the Board, treated him differently from others similarly situated — specifically, that the FAA did not discharge other employees on approved annual leave. But there is no showing that for these employees the same evidence of strike participation was available. In any event, the FAA never recognized, "implicitly" or otherwise, that a notice in the read and initial binder was "insufficient."

Supreme Court, U.S.
FILED
FEB 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE J. HODGES,

Petitioner,

– against –

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER

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SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-867

WILLIE J. HODGES,

Petitioner,

-against-

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER

PRELIMINARY STATEMENT

This reply brief addresses arguments first raised in the brief in opposition and other intervening matter not available at the time of the filing of the petition.

REPLY TO ARGUMENTS RAISED IN BRIEF IN OPPOSITION

1. Contrary to respondent's argument (p. 5 of its brief), it is improper to draw an adverse inference from petitioner's failure to testify. Such an adverse inference may be drawn only after the agency has established a prima facie case. Adams v. Department of Transportation, FAA 735 F. 2d 488, 492 (Fed. Cir. 1984), cert. denied, No. 84-258 (Nov. 13, 1984).

In each of the four Merit Systems Protection Board cases cited in the petition (pp. 9-10, 14-16)[1], the Board found that the agency's failure to show that the

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1. The four cases are Carpenter v. Department of Transportation, Docket No. NY075281F1432, 17 M.S.P.R. 84 (MSPB 1984); Coleman v. Department of Transportation, Docket No. NY075281F0482ADD, 21 M.S.P.R. 596 (MSPB 1984); Ailes v. Department of Transportation, Docket No. NY075281F0842, 17 M.S.P.R. 114 (MSPB 1983) and Benson v. Department of Transportation, Docket No. PH075281F1021, 19 M.S.P.R. 596 (MSPB 1984).

notice of leave cancellation had been effectively communicated to the controller resulted in a failure to establish a prima facie case. Since, as we have shown in the petition, the agency introduced no evidence that petitioner had received notice of leave cancellation, the burden did not shift to the petitioner pursuant to Schapansky v. Department of Transportation, FAA, 735 F. 2d 477, 482-3 (Fed. Cir. 1984), cert. denied 105 S. Ct. 432 (1984). Moreover, petitioner had already denied, in his interrogatories, which the presiding official made part of the record, that he was aware of any facility order which required him to take action in the event of a strike. Since the only evidence of leave cancellation was the Chief's testimony that a notice had been placed in the "read and initial" binder more than six weeks prior to the strike

and there was no evidence that the petitioner had read or initialed the notice or received any other communication that leaves were cancelled, there was nothing for petitioner to rebut and no reason for him to take the stand.[2]

2. Although respondent (p. 3 of its brief) would have it appear that the full Board addressed the issues raised by petitioner when it denied review of the presiding official's initial decision, a careful reading of the Board's opinion and order (App. B., pp. 21-24) reveals that the Board did not deal with the issue at all. In footnote 2, the Board listed the numerous issues raised in the petition for review by the twenty-three controllers who were the appellants in the consolidated case. None of the issues involved

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2. The notice was not even introduced in evidence. Petitioner was not represented by attorney who might have advised him, as a precautionary measure, to testify.

the question of whether the June 16, 1981 notice was sufficient to cancel annual leave.

3. Petitioner is not relying, as respondent asserts (p. 5, fn. 3 of its brief) upon evidence contained in other records of other appeals to the Board. Petitioner is relying, as he is entitled to do, upon decisions of the Board which found that the same June 16th memorandum that was involved at the same TRACON facility as is involved in petitioner's case, was insufficient to communicate a cancellation of previously approved annual leave. The respondent itself, in numerous cases involving the air traffic controllers, has relied upon facts of general application adduced in certain "lead" cases. In this very case, it relies on the facts set forth in Campbell v. Department of Transportation, FAA No. 84-78. Certainly,

petitioner is entitled to rely upon findings by the Board that certain events affecting substantial numbers of controllers, which negated the sufficiency of the notice of leave cancellation, took place at his and other facilities.

4. Mobil Oil Corp. v. FPC 417 U.S. 283, 309-310 (1974) (cited by respondent on p. 6 of its brief) is inapplicable since there is no basis for determining whether the court of appeals "misapprehended or grossly misapplied", or even applied, the substantial evidence test. Its one sentence opinion did not discuss the substantial evidence test or any other test defined in 5 U.S.C. §7703(c) (Pet. p.3). In fact, the opinion gives no indication that the court reviewed the record in accordance with the mandate of that section.

5. Respondent's attempt to distinguish Carpenter, Benson, Coleman and Ailes (pp. 6-7 of its brief) is unavailing. Each of those cases found the June 16 memorandum to be insufficient notice since there was no evidence that the controller had actually read the memorandum and/or because it was issued more than a month prior to the controller's leave. Moreover, it is not true that petitioner never alleged facts similar to Benson (respondent's brief p. 7). Petitioner's adverse action file contained the same telegram that was referred to in Benson, i.e. that he was to report for duty on his scheduled shift. Petitioner's next scheduled shift was August 13, 1981 and he was discharged for not reporting to work on August 6, 1981.

Respondent contends, (Resp. brief p. 7, fn. 5) that there is no showing that

for the employees in the four similar cases "the same evidence of strike participation was available". There was not one shred of evidence of strike participation by petitioner. It is also not true, as contended in the same footnote, that the FAA never recognized "implicitly" or otherwise, that a notice in the read and initial binder was "insufficient". As the Board states in Ailes, at fn. 4, "the fact that the agency issued the order of July 31 [when petitioner was already on vacation] tends to weaken its argument that it depended on the July 16 order to establish cancellation of annual leave at the time of the strike in August".

INTERVENING MATTER NOT AVAILABLE AT THE TIME OF FILING OF PETITION

On December 5, 1985, a motion was made in the Court of Appeals for the Federal Circuit to gain compliance with the court's own rules relating to the

assignment of judges. The motion set forth facts of which petitioner was previously unaware, showing that all of the approximately 100 appeals in air traffic controllers' cases have been assigned to one of two 3-judge panels made up of the original lead case judges[3] and a senior judge. The motion, although unopposed was denied on December 17, 1985 and a motion for in banc review was made on January 10, 1986. That motion, also unopposed, is still pending. (White v. Department of Transportation, FAA, No. 85-1503)

There are serious questions as to the validity of any decision made by an improperly constituted panel. 28 U.S.C. § 46(b) requires that the Court of Appeals for the Federal Circuit "determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the

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3. The issues in this case were not addressed in the lead cases.

judges sit in a representative cross section of the cases heard". Pursuant to such requirement CAFC Rule 3(b) provides that "Assignment of cases to panels will be made so as to provide each judge with a representative cross section of the cases heard by the court". Section 20 of the court's Procedural Handbook states that the purpose of the varied assignments is "designed to ensure opportunities for each judge to sit with all other judges, that each judge sits in all type of cases, and that both the appearance and the fact of presentation of particular cases to particular judges is avoided."

When a case is heard by an improperly constituted panel, the judgment must be vacated and the case remanded and reconsidered with a properly constituted panel. United States v. American Foreign Steamship Corp. 363 U.S. 684 (1960);

Uzzel v. Friday 625 F. 2d 1117, 1120-1121 (4th Cir. 1980; in banc), cert. denied 466 U.S. 95 (1980).

Respectfully submitted,

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Dated: New York, New York
February 3, 1986

Supreme Court, U.S.
FILED
FEB 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-867

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIE J. HODGES,

Petitioner,

-against-

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

Joan Stern Kiok
Counsel for Petitioner
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New York, New York 10004
(212)635-0700

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-against-

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

In his reply brief, petitioner (at pages 8-11) raised the issue of the validity of the decision below, on the ground that it was made by an improperly constituted panel. Reference was made to a motion in the case of White v. Department of Transportation, FAA, No. 85-1503, which was then pending in the Court of Appeals for the Federal

Circuit. The Court of Appeals denied the motion on February 7, 1986, (A copy of the Order is annexed as Appendix "A").

The reason given for the denial of the motion was that it did not challenge any action the court has taken against air traffic controllers represented by the attorney who made the motion and thus constituted a request for an advisory opinion.

The refusal of the Court of Appeals to grant the relief requested, i.e. compliance with the statute and the court's own rules relating to the assignment of judges, and its failure, sua sponte, to grant relief for those controllers whose cases had already been decided by improperly constituted panels, means that the only available remedy is by an order of this Court.

Respectfully submitted,

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Dated: New York, New York
February 14, 1986

Appendix A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KARL B. WHITE,

Petitioner for In Banc Review,

Original Motion entitled

CERTAIN FIRED AIR TRAFFIC CONTROLLERS [Listed in Exhibit 1],

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-1503

Before MARKEY, Chief Judge, FRIEDMAN, RICH, DAVIS, BALDWIN, BENNETT, SMITH, NIES, NEWMAN, BISSELL, and ARCHER, Circuit Judges.

ORDER

Petitioner, by his attorney Richard J. Leighton, having moved on January 10, 1986, for in banc review of denial by the Chief Judge on December 17, 1985, of Petitioners'

Appendix A

[second title above] "Motion to Prevent the Appearance and the Fact of Presentation of Particular Cases to Particular Judges and to Gain Court Compliance with its Own Procedures," filed December 5, 1985, "Exhibit 1" in the heading of the original motion being a listing of 120 appeals to this court by "fired air traffic controllers" allegedly represented by said Richard J. Leighton; and

Petitioner having moved on January 21, 1986, for "oral hearing" by the court in banc "except for the Chief Judge," who denied the original motion aforesaid; and

The court, in banc, having considered all the papers in Petitioner's original motion and his motion for review in banc and his motion for oral argument on the motions; and

Appendix A

The court having unanimously determined that said motions amount to no more than a request that the court, in its future consideration of appeals brought to this court by the aforesaid Richard J. Leighton as an attorney for Petitioner White and for other appellants shall conduct said appeals in accordance with the statutory law, the Federal Rules of Appellate Procedure, and the Rules of the United States Court of Appeals for the Federal Circuit insofar as they govern procedure in this court; and

The motion not having challenged nor sought relief with respect to any action this court has taken against the petitioner or any other individuals represented by the petitioner's attorney, but having sought an advisory opinion regarding the procedure this court may

follow in dealing with such cases, the court having no authority to render advisory opinions,

NOW THEREFORE, IT IS ORDERED THAT:

1. The request for review of the denial of the motion in banc is granted;

2. The requests for oral argument of the motion and for exclusion of the Chief Judge are denied; and

3. The original motion of December 5, 1985 is denied in banc.

FOR THE COURT IN BANC

2/7/86
Date

(s) Francis X. Gindhart
Clerk